



Rural Telephone Coalition

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Policy and Rules Concerning the)
Interstate, Interexchange Marketplace)

CC Docket No. 96-61

Implementation of Section 254(g) of the)
Communications Act of 1934, as amended)

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COMMENTS
OF THE
RURAL TELEPHONE COALITION

April 19, 1996

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SUMMARY

New Section 254(g) of the 1996 Act requires the FCC to adopt rules that require interexchange carriers (IXCs) to geographically average and integrate their rates. The RTC strongly supports the duplication of the language in 254(g) in the Commission's regulations. However, additional rules are necessary to effectively implement the rate averaging and integration requirements. First and foremost, IXCs must continue to be required to publicly file their rates with the Commission. Without some sort of rate filing, there would be no way for a complainant to establish that a violation of the rate averaging or integration requirements occurred. While it is not necessary for IXCs to file a traditional tariff, rate filings must provide sufficient information for complainants to survive routine summary judgement motions alleging failure to plead a *prima facie* case. In addition, any complainant that is successful in establishing a violation of Section 254(g) should receive retroactive damages back to the time that averaged rates first became unavailable.

The rules the FCC adopts must balance deterrence from violations and positive incentives to serve rural areas at averaged rates. To justify even the limited forbearance the RTC

recommends from traditional tariff requirements, the FCC will need to take steps to counteract the mounting deaveraging and rural service deterioration pressures that added interexchange competition will stimulate. For example, the FCC must enforce Section 214 fully to mitigate perverse incentives to "average" by withdrawing or curtailing interexchange services.

In addition, decisions on other universal service issues under the rest of Section 254 must dovetail with the Commission's rules on rate averaging and rate integration. One important way to reduce deaveraging incentives would be to bulk bill DEM weighting cost recovery to remove it from rural LEC traffic sensitive access charges. The FCC should also further implement the rural and urban rate and service comparability and rural interexchange access principles in Section 254(b)(3) using universal service mechanisms to reduce the rural/urban common line and traffic sensitive access charge disparities that drive IXCs towards deaveraging rural rates.

The 1996 Act requires that optional discount plans be made available and advertised in the entirety of an IXC's service area including rural areas. Area-wide advertising will be necessary to enable customers and other carriers to take advantage of averaging and to identify where complaints are appropriate.

And, while the RTC does not object to the "bundling" of CPE and interexchange services, such packages cannot lawfully preclude the public's ability to assess whether the rates for the interexchange service portion of the package are geographically averaged. Therefore, the Commission should require IXCs offering bundled packages to unbundle them for the purpose of publicly filing the interexchange rate portion of the package with the Commission. Lastly, the RTC agrees with the Commission that Section 254(g) need not preempt state laws or regulations requiring intrastate geographic rate averaging so long as the state's regulations comply with the Act and are consistent with the rules adopted by the FCC.

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COMMENTS OF
THE RURAL TELEPHONE COALITION

I. INTRODUCTION

On March 25, 1996, the Federal Communications Commission (FCC or Commission) released the text of a Notice of Proposed Rulemaking¹ concerning the matter of policies and rules for interstate, interexchange service providers that must be addressed in response to the Telecommunications Act of 1996.²

¹In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61, Implementation of Section 254(g) of the Communications Act of 1934, as amended, Notice of Proposed Rulemaking, FCC 96-123, (March 25, 1996). (NPRM, Notice)

²Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996). (1996 Act, Act)

The Rural Telephone Coalition (RTC) hereby submits its comments in response to the Commission's NPRM.

The RTC is an alliance of the National Rural Telecom Association (NRTA), the National Telephone Cooperative Association (NTCA), and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO). The three associations together represent more than 850 local exchange carriers (LECs) serving rural areas throughout the United States.

The RTC's primary concern in this proceeding is with the Commission's implementation of the geographic rate averaging and rate integration requirements of the 1996 Act.³ What previously was an FCC endorsed policy, has now become a Congressional mandate for which the FCC must adopt enforceable rules. Specifically, new Section 254(g) of the Communications Act requires the Commission to:

³In the course of the RTC's comments on geographic rate averaging and rate integration, we touch upon other items raised in the NPRM -- detariffing, for example -- for which comments are not due until April 25, 1996. Also discussed are issues under consideration in the universal service proceeding, CC Docket No. 96-45. These items are interrelated with and inseparable from the CC Docket No. 96-61 issues, and therefore, integral to the Commission's effective implementation of the geographic rate averaging and rate integration requirements.

...adopt rules to require that the rates

telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.

The Commission apparently proposes to duplicate the statutory geographic rate averaging and rate integration language set forth in Section 254(g) in its regulations.⁴ The RTC supports this proposal. However, the additional rules the Commission adopts to implement this section are equally important in ensuring rural subscribers' ability to make long distance calls at reasonable, comparable, and affordable rates. Accordingly, the RTC has a paramount interest in the outcome of this proceeding.

II. PUBLICLY FILED RATES ARE ESSENTIAL TO ENSURING COMPLIANCE WITH THE GEOGRAPHIC RATE AVERAGING AND RATE INTEGRATION REQUIREMENTS

The Commission proposes in the NPRM to adopt a mandatory detariffing policy for the domestic services offered by non-dominant interexchange carriers (IXCs) (which, now that the

⁴NPRM at paras. 67, 76.

Commission has declared AT&T non-dominant, effectively means all IXCs).⁵ The RTC understands the Commission's concerns regarding the possible anticompetitive effects of the existing tariff rules. However, without public rate filings by IXCs, the FCC cannot effectively establish, monitor, and enforce compliance with the 1996 Act's geographic rate averaging and rate integration mandates.

In the NPRM, the FCC tentatively concludes that, in lieu of tariffs, it can ensure compliance with its geographic rate averaging and rate integration rules by requiring IXCs to file certifications that they are in compliance. It further claims that the complaint process under Section 208 will be sufficient to bring violations to its attention.⁶ This proposed system is incapable of adequately enforcing the rate averaging and rate integration requirements and, thus, does not comport with the intent of Congress.

An analogy to the Commission's proposal would be if, as a condition of obtaining a driver's license, all motorists were required to sign a document certifying that they would obey all

⁵NPRM at paras. 19, 27.

⁶NPRM at paras. 70, 78.

posted speed limits. Then, instead of having traffic police, it was up to other civilian motorists, who were not equipped with radar, to report all speeders to the authorities and prove their case against them. Obviously, this system would never work because, among many pitfalls, civilians are not equipped with the necessary tools to demonstrate adequately that an infraction of the law occurred.

By itself, certification promising compliance with the law -- including rate averaging, rate integration, and optional calling plan availability -- is ineffective in ensuring that the law is actually being followed. However, when combined with other monitoring mechanisms, discussed *infra*, certification can be an important part of the Commission's enforcement rules and should be required. The FCC should be certain to subject IXCs' rate averaging and integration certifications to the criminal penalties for perjury under Title 18 of the U.S. Code, as are the certifications on FCC license applications. In addition, any complainant that is successful in establishing a violation of Section 254(g) and the implementing rules should receive retroactive damages back to the time that average rates first became unavailable.

Along with a legally binding certification, IXCs must provide the public with the necessary "radar" to detect and establish non-compliance in a Section 208 complaint proceeding. The "radar" in this case is the filing of rates with the Commission. The filing should provide sufficient information for complainants to survive routine summary judgement motions alleging failure to plead a *prima facie* case. Without some sort of public rate filing, it would be nearly impossible for anyone to monitor compliance with the requirements in Section 254(g). And, without a publicly filed rate, it would be extremely difficult for a complainant to show that rates have been deaveraged.⁷ Additionally, Commission rules in Subpart E. 47 C.F.R. §1.701 et. seq. should be revised to permit and require timely decisions on complainants alleging Section 254(g) violations.

The RTC does not seek to burden IXCs with the requirement of full-blown tariff regulation. Somewhere between the Commission's proposed certification and a traditional tariff regime lies a

⁷The Commission has recently noted that complaints must state facts which are "specific, complete, and explicit." Letter of April 5, 1996 from Curt A. Schroeder, Chief, Formal Complaints and Investigations Branch, Enforcement Division to Michael J. Shortley III.

reasonable and appropriate information submission that discloses IXCs' rates explicitly but does not report extraneous information unnecessary for ensuring compliance with the statutory rate averaging and integration requirements. In addition, the RTC would not object to permitting interexchange rates to take effect on the same day they are filed.⁸ This should help to alleviate the concern that advance filing of rates provides competitors with a "head start" in responding to the new rate before it has even taken effect.

Regarding the Commission's concern of possible price coordination among IXCs, it is not clear that mere publication of rate changes provides any basis for illegal collusion. To the extent that tacit price collusion occurs as a result of the filed rates, this is a matter that should be handled by the Department of Justice. However, the possibility of collusion, the existence of which the Commission found to be inconclusive in the AT&T Reclassification Order,⁹ is not a sufficient reason in which to establish a rule that offers no way of monitoring compliance with

⁸The rates of non-dominant IXCs already take effect on one day's notice and with the presumption of lawfulness. 10 FCC Rcd 13, 653 (1995).

⁹AT&T Reclassification Order at paras. 81-83.

a requirement mandated by Congress and so vital to the public interest in rural areas.

III. THE COMMISSION MUST PROVIDE FOR ADEQUATE INCENTIVES AND ENFORCEMENT TO COMPLY WITH THE RATE AVERAGING AND INTEGRATION REQUIREMENTS AND JUSTIFY FORBEARANCE UNDER SECTION 401 OF THE 1996 ACT

The Commission is still obligated to maintain an adequate public rate filing requirement for IXCs in order to fulfill the intent of Congress for interstate and intrastate rate averaging. It must consider compliance with Section 254(g) separately from its general desire to detariff interexchange services. In light of the new statutory averaging mandate, an adequate substitute for traditional tariff regulation must be adopted to satisfy the requirements of Sections 254(g) and 401.¹⁰

The FCC proposes detariffing because non-dominant firms do not have the market power to price their services anticompetitively.¹¹ However, the increased competitive pressure on IXCs to drive rates towards their actual cost, precipitated by

¹⁰Section 401 of the 1996 Act requires the Commission to forbear from applying any regulation if (1) enforcement is not necessary to ensure that the charges and practices in connection with a telecommunications carrier or service are just, reasonable and neither unjustly nor unreasonably discriminatory; (2) enforcement is not necessary for the protection of consumers; and (3) forbearance is consistent with the public interest.

¹¹NPRM at para. 28.

the 1996 Act, further jeopardizes the ability of rural customers to be charged just and reasonable -- i.e. averaged -- interexchange rates. The "Big 3" (AT&T, MCI, and Sprint) will soon begin to face increased competition from the Bell Operating Companies (BOCs) and others in densely populated urban centers. Because these new long distance competitors need not serve high-cost areas, they will be able to compete effectively in urban centers by undercutting the established IXCs' rates with rates that are much closer to the actual cost of providing service. This increased competition in the "Big 3's" most profitable regions will provide an even greater incentive to deaverage rates. Without the requirement of an adequate public rate filing to take the place of traditional tariff regulation, the temptation and ability to deaverage would increase exponentially, putting universal service in rural areas, as embodied in the 1996 Act, at great risk.

Deaveraging would cause toll rates in rural areas to rise dramatically. The costs of carrying a call to rural areas generally are much higher because of lower population density and less telecommunications traffic. Rural customers already tend to place more long distance calls than their urban counterparts because of smaller local calling areas covered by

their local rates. Often, calls to doctors, emergency services, and schools are long distance calls for customers in rural areas.

Just as important in today's society is access to the Internet. Unfortunately, most rural residents do not have local access to commercial on-line services. In addition, the ability of rural communities to attract businesses to their areas is highly dependent upon parity with urban centers in the quality and price of telecommunications services. An unreasonable increase in rates could prevent rural access to the information revolution and the security of a diverse economic base.

Moreover, the deaveraging of toll rates could lead to a decrease in telephone subscribership, an issue for which the FCC has shown great concern.¹² The RTC strongly believes that public policy that results in even a small number of subscribers disconnecting telephone service, or becoming unable to make necessary long distance calls, because they can no longer afford service, is not acceptable.

Clearly, complete forbearance from rate filings does not meet any of the three criteria that must be satisfied to forebear

¹²See, In the Matter of Amendment of the Commission's Rules and Policies to Increase Subscribership and Usage of the Public Switched Network, CC Docket No. 95-115, Notice of Proposed Rulemaking, 60 FR 44296 (August 25, 1995).

under Section 401 of the Act: (1) interexchange rates could become unjustly or unreasonably discriminatory; (2) rural consumers would not be protected from IXCs' ability to deaverage their rates in secret; and, as a result, (3) forbearance would be inconsistent with the public interest in rate averaging and rate integration that led Congress to adopt Section 254(g).

Therefore, the FCC cannot and must not completely forbear from its rate filing requirement.

Instead, the FCC must adopt an approach that combines positive incentives to serve rural areas at averaged rates and workable ways to detect, correct, and provide restitution for violations. To justify even the more limited forbearance from traditional tariff requirements involved in the informational filings and certifications described *supra*, the FCC will need to take steps to counteract the mounting deaveraging and rural service deterioration pressures that added interexchange competition will stimulate. For example, the FCC must enforce Section 214 fully to prevent discontinuation and degradation of rural services by carriers seeking to maintain averaged rates through leaving higher cost locations to reduce their average

costs.¹³ It must also seek to prevent newer interexchange carriers from bypassing rural areas to avoid their averaging obligations.

To make rate averaging a reality, decisions on other universal service issues under the rest of Section 254 of the 1996 Act must dovetail with the Commission's rules on rate averaging and rate integration. One important way to reduce deaveraging incentives would be to bulk bill dial equipment minute (DEM) weighting cost recovery to remove it from rural LEC traffic sensitive access charges. Another way to maintain adequate rural service incentives is to implement the specific rate averaging and integration requirements in Section 254(g) in conjunction with other statutory requirements. For example, the FCC should further implement the rural and urban rate and service comparability and rural interexchange access principles in Section 254(b)(3) by using universal service support to reduce the rural/urban common line and traffic sensitive access charge disparities that drive IXCs towards deaveraging rural rates. Providing support to eligible carriers with above average access

¹³An example of such degradation without Section 214 certification is AT&T's announcement that it will discontinue handling certain calling card calls from LEC subscribers.

charge revenue requirements will not only diminish incentives to deaverage IXC rates but will also encourage more IXCs to serve rural areas. The universal service and deregulation balance is what is critical: Only with adequate safeguards for rural rates and the rural public can the Commission make the required forbearance finding to reduce tariff regulation at all.

IV. THE COMMISSION'S RULES MUST REQUIRE THAT OPTIONAL DISCOUNT PLANS BE OFFERED UBIQUITOUSLY THROUGHOUT AN IXC'S SERVICE AREA

The Commission seeks comment on whether an interexchange carrier's failure to make a promotional plan available in the entirety of its service area constitutes geographic rate deaveraging, and if so, whether the Commission should require that discount rate plans be made available and advertised in the entirety of an IXC's service area.¹⁴ Congress has already answered the basic question in the affirmative. The Manager's Statement of the 1996 Act states that any exceptions from the averaging requirement, such as Tariff 12 and others, must "be generally available in the area served by a particular provider."¹⁵ Thus, optional calling plans offered by an IXC must

¹⁴NPRM at para. 72.

¹⁵1996 Act, Joint Explanatory Statement of the Committee of Conference, p. 132.

be made available throughout its entire service area including the rural areas it serves.¹⁶ Area-wide advertising will be necessary to enable customers and other carriers to identify areas where complaints are appropriate. In addition, if IXCs exclude rural areas from their service areas, the Commission may have to invoke its powers under Section 214(d).

V. STATE REGULATIONS AND BUNDLED OFFERINGS MUST ALSO COMPLY WITH THE 1996 ACT

The RTC agrees with the Commission that Section 254(g) need not preempt state laws or regulations requiring intrastate geographic rate averaging so long as the state's regulations do not conflict with the Act or the rules adopted by the FCC.¹⁷ It would seem reasonable that the FCC could target its preemption efforts to state laws, rules, and policies that are not adequate to insure intrastate geographic rate averaging within six months after the date of enactment of the 1996 Act -- the same deadline imposed on the Commission for its rules.¹⁸ Absent a state's adoption of rules by this deadline, the Commission's rules should

¹⁶The practical effect should be that volume discounts and other special rates return to geographic average status.

¹⁷NPRM at para. 68.

¹⁸1996 Act at Sec. 101 (adding Sec. 254(g)).

also act as the intrastate rate averaging requirements for IXCs operating in that state.

Finally, the RTC supports the Commission's proposal to permit non-dominant IXCs to bundle customer premises equipment (CPE) with interstate, interexchange services. However, a bundled package cannot lawfully preclude the public's ability to assess whether the rates for the interexchange service portion of the package are geographically averaged. Therefore, the Commission should require IXCs offering bundled packages to unbundle them for the purpose of publicly filing the interexchange rate portion of the package with the Commission. Furthermore, to the extent that the long distance rate offered through the bundled package is a discount or promotional rate, this rate should be offered ubiquitously throughout the IXC's service area, either via the bundled offering or by itself. The RTC does not believe that there is any need for IXCs to publicly file the price of the CPE.

VI. CONCLUSION

Understanding the integral role of geographic rate averaging in achieving universal service, Congress has required the FCC to adopt rules mandating IXCs to geographically average and integrate their rates. In order for the mandates to be

effectively implemented, however, IXCs must be required to file their rates publicly with the Commission, so that compliance can be monitored. In addition, the FCC will need to integrate Congress' intent about the availability of optional calling plans and contract arrangements and to mitigate perverse incentives to "average" by withdrawing or curtailing rural interexchange services. By adopting the recommendations stated within, the FCC will appropriately fulfill Congress' intent in Section 254(g) of the 1996 Act and will help to ensure that rural Americans are afforded reasonable and comparable access to the interexchange network.

Respectfully submitted,

THE RURAL TELEPHONE COALITION

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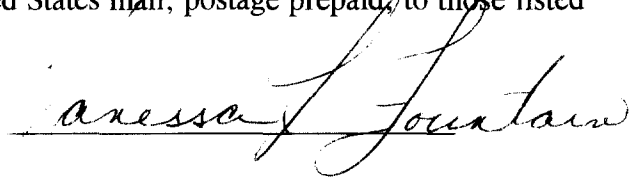
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CERTIFICATE OF SERVICE

I, Vanessa L. Fountain, hereby certify that a copy of the RTC's comments was sent on this, the 19th day of April, 1996 by first class United States mail, postage prepaid, to those listed on the attached sheet.

A handwritten signature in cursive script, reading "Vanessa L. Fountain", written over a horizontal line.

Vanessa L. Fountain

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